NOTES

WASHINGTON NOTES

Probably the most important decision handed down by the federal Supreme Court within the last few years is the opinion in the Standard Oil case, delivered by Chief Justice White on May 15 (Supreme Court of the United States, October Term, 1910, No. 398). This has now been printed as a Senate document for general distribution (Sen. Doc. No. 34, 62d Cong., 1st sess.). The general finding of the court is adverse to the Standard Oil Company and in favor of the government, the company being directed to dissolve within six months on the ground that it is a combination of the kind properly to be held illegal under the Sherman anti-trust law of 1890. While, however, very widespread interest has been excited by the facts reviewed in the finding and by their effect on the stock market, the controlling interest is undoubtedly expressed in the general legal foundations of the decision, and the position assumed by the court therein. Briefly stated, the court's view is that the Sherman anti-trust act, in prohibiting every combination in restraint of trade, is simply a statutory statement of the common law, and when interpreted in the light of common-law precedents amounts merely to a prohibition of every unreasonable or improper combination in restraint of trade. This then places on the court itself the duty of determining when and under what circumstances a combination is actually in restraint of trade in the sense referred to by the law. Perhaps the most significant passage of the decision bearing upon this new and pregnant doctrine is that in which the court undertakes to justify its interpretation of the act and in so doing offers the following defense:

When the second section of the act is harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the first and second sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless, by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to control was the essence of freedom from undue restraint on the right to contract.

While the Standard Oil decision and particularly that phase of it which has been especially set forth in the foregoing language was received with more than a little satisfaction by those business interests which had feared a "narrow interpretation" of the statute, and while consequently the depressed state of prices on the stock markets of the country gave way to an active upward movement, the optimism thus shown was speedily superseded by a calmer and more reflective frame of mind. It was seen that the real future of the industrial combinations of the country was dependent under the Standard Oil decision upon two essential factors: (1) whether or not the national administration would or would not undertake prosecutions against the concerns which are on the border line of doubt as to their legality; and (2) whether the courts, and ultimately the federal Supreme Court, would or would not adopt a severe attitude with respect to their "reasonableness" or "unreasonableness." It was recognized that the adverse finding in the Standard Oil case threw no light upon the latter factor, inasmuch as, if the Standard Oil Company were not found in violation of the Sherman Act, there would probably be few, if any, corporations which would thus be in violation. Interest in the finding in the

American Tobacco Company case, the companion suit to the Standard Oil case, was therefore redoubled.

A decision in the American Tobacco Company case was handed down on May 29, two weeks after the judgment in the Standard Oil case (October Term, 1910, Nos. 118 and 119, Sen. Doc. No. 40, 62d Cong., 1st sess.). In this, a point of view even more severe toward the defendant corporation than in the Standard Oil case was adopted. The court ordered the concern dissolved and brought into conformity with law, holding that it also was unmistakably a combination in violation of the spirit of the Sherman Act. The growth of the American Tobacco Company is thoroughly familiar to students of the development of American capitalism and the Supreme Court's review adds nothing new to financial history. Nor is there anything in the decision by way of reasoning which makes it different from, or superior to, that in the Standard Oil case. A notable and unique feature of the decision, however, is found in the suggestion that the combination could be brought into a position honestly in conformity with existing law, and that in so doing it must be guided by the orders of the lower court before which the cause was originally urged. This idea was expressed in the following salient words:

> We must approach the subject of relief from an original point of view. Such subject necessarily takes a twofold aspect—the character of the permanent relief required and the nature of the temporary relief essential to be applied pending the working out of permanent relief in the event that it be found that it is impossible under the situation as it now exists to at once rectify such existing wrongful condition. In considering the subject from both of these aspects dominant influences must guide our action: (1) The duty of giving complete and efficacious effect to the prohibitions of the statute; (2) the accomplishing of this result with as little injury as possible to the interest of the general public; and (3) a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as

the permanent relief to be awarded is concerned, we should decree as follows: First, That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the anti-trust act. Second, that the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with, and not repugnant to, the law.

The significance of the finding was promptly seen in the expression of the opinion by financial interests that there had now for the first time been afforded to them a definite means of ascertaining how and by what process they might bring themselves into conformity to law, inasmuch as it would now be the duty of the lower court to pass upon the remedies suggested by attorneys for the company. That this is actually to be a means of supplying such a mode of determination as has been sought by the capitalistic combinations is indicated by the fact that, since the Tobacco decision was rendered, officers of the government have referred inquiring representatives of corporations to the proceedings shortly to be instituted in the federal court for the southern district of New York, there to learn by what means it would be practicable for the American Tobacco Company to reorganize in a form not obnoxious to the spirit of the Sherman Act. Apart from the immediate effect of these decisions upon the stock market, which has been favorable, the anti-trust situation in Congress has been somewhat clarified, the issues on either side standing out with decidedly greater clearness than at any time in the recent past. The so-called "conservative" element in Congress now takes the view that the anti-trust situation has been reduced to a satisfactory position, inasmuch as the question of reasonableness can be determined by the courts, and inasmuch as the two decisions in question have shown a strong disposition on the part of the federal tribunal to protect the rights of the public in the most positive manner. On the other hand, radicals in the Republican party, and the main body of the Democrats are disposed to argue that the determination of the reasonableness of a corporate enterprise cannot properly be left to the

courts to adjudicate. They urge that the Supreme Court, by taking this burden upon itself, has practically read a new provision into the law, and thereby in some measure usurps the power of Congress. Such radicals seem inclined further to urge two entirely distinct and alternative methods of legislation under the given conditions. One of these would be the revision of the Sherman Act in such a way as to make it apply to all contracts in restraint of trade, specifically mentioning both those which are, and those which are not, reasonable. The other alternative is the assumption by Congress of the authority to fix prices and rates of dividends in all those cases where a commodity has been monopolized in whole or in large measure by a capitalistic combination. The first suggestion repels the majority of students by reason of its essentially absurd character; while the second repels in even greater degree by its profoundly radical and "state-socialistic" tendencies. That nothing can or will be attempted in the way of anti-trust legislation at the current session of Congress, and probably not until after the next presidential election is the evident indication of the decisions, and of the state of feeling in Congress that has grown out of them. The business world, while awaiting with intense interest the action of the New York court in the Tobacco case, and while looking anxiously to the federal administration for a declaration of policy on the trust question, is plainly much relieved by the nature of the decisions on both of these cases.

As a result of long-protracted hearings before the Senate Finance Committee the Canadian reciprocity agreement has been advanced another important step, being reported by the committee on June 13 to the full Senate. This places the measure before the upper chamber for final debate. While reporting the bill, however, the committee has struck a severe blow at it by adding an amendment. In the original form in which the bill carrying into effect the Canadian agreement was passed by the House of Representatives at the last session of Congress, the Ways and Means Committee made a slight change of the terms that had been used in drafting the measure in the State Department. The State Department draft of the bill would not have allowed for reciprocity in print paper until after all the Canadian provinces had removed their restrictions upon the exportation of wood pulp made of wood grown on

"crown," or public, lands. The Ways and Means Committee so altered this provision as to permit free introduction of print paper into the United States in all cases where it had been manufactured of wood pulp made from wood cut in private lands free of the export restrictions. Inasmuch as a large proportion of the paper is so made, the change was desired by the administration on the ground that the advantage thus given to the owners of private lands would have enabled the government to use some leverage to induce the Canadian provinces to remove the export restrictions applying to the wood cut on "crown" lands. That this leverage would have been considerable is the general belief. The Senate Finance Committee has not been willing to allow so much latitude to the administration, however, but has added an amendment offered by Senator Root of New York providing that no paper shall be admitted free to the United States from Canada unless reciprocity in print paper shall first have been established between the two countries. While admitting that this amendment does not put the agreement in jeopardy, because of the fact that it is in conformity to the terms of the original agreement, the alteration is regretted by the friends of reciprocity, not only because of the narrowing effect of the amendment, but also because of the fact that difficulties will be produced in conference committee owing to the difference in form between the reciprocity bills as passed by the two houses. Moreover, the change may open the way for other amendments in the Senate which might conceivably cause serious trouble in securing the ultimate ratification and acceptance of the agreement by the Canadians. The long-drawn hearings before the Finance Committee, while developing no material of broad economic importance, have resulted in bringing together a large mass of data illustrating the conditions which exist in a few important industries in the United States (Hearings; Senate Finance Committee, 62d Cong., 1st sess.). These are largely either paper-making in its various branches or agricultural industries of various classes.

While the reciprocity contest has been in progress in the Senate an important step has been taken in the House of Representatives by the reporting of the so-called "Underwood" wool tariff revision bill. This bill (H.R. 11,019) represents the result of some two months of struggling on the part of Democratic leaders to bring about an agreement among the different factions within the party

as regards the revision of the duties on wool and woolens. The fundamental feature of the bill is the change from specific duties on raw wool running as high as 11 cents per pound to an *ad valorem* duty of 20 per cent, estimated to be equivalent to about 5½ cents per pound. With this is coupled a general reduction of about 50 per cent in the rates of duty on fabrics. The anticipated results of the proposed bill may be represented in comparative form about as follows:

Item	Present Act: Results for Year Ending June 30, 1910	Proposed Act: Estimated Results for a 12-Month Period
Raw wool:		
Imports	$47,687,293.20	$66,991,000.00
Duties	21,128,728.74	13,398,200.00
Average unit of value, per pound	0.186	.....
Equivalent *ad valorem* rate: percentage	44.31	20.00
Manufactures of wool:		
Imports	33,057,958.78	63,831,000.00
Duties	20,776,121.26	27,157,800.00
Equivalent *ad valorem* rate: percentage	90.10	42.55
Total revenue	$41,904,850.00	$40,556,000.00

In reporting on the effect of the new wool and woolens bill (H.R. report No. 45, 62d Cong., 2d sess.) Mr. Underwood and the Committee on Ways and Means have offered very severe criticism of the present tariff on woolens, saying that it is not only unjust to the consumer but disastrous to that branch of the trade which manufactures "woolen" as distinct from "worsted" cloth—a point of view amply borne out by the facts as revealed in the course of the past few years. Apart from the change from specific to *ad valorem* rates of duty probably the most significant alteration made by the new measure is seen in the changes affecting the so-called compound duties on the manufactured products. Of these the committee says:

The compound duties on manufactures of wool, which are such an important characteristic of the present Schedule K, appear first in the duties on tops and then in those on yarns and all of the other manufactures of wool throughout the schedule. The object of these compound duties is to provide a duty in two parts and for two especial purposes. The first purpose is to "compensate" the manufacturers for the duties levied on the raw wools, the materials for all the manufactures. It is taken for granted that the manufacturers have paid the amount of the duties on the raw wools

entering into their additional cost of domestic wools. The first purpose of the duty on the manufactured article is to "square" or "compensate" the manufacturers for the burden involved in the duties on their raw materials, and this is done by the first or specific part of the compound duty. As the duties on the raw wools are specific, the compensatory duties must be specific also, and thus the evil and injustice of the specific duty is carried along into, and compounded and multiplied in, every other article into which the article specifically taxed enters as a material. The specific duty breaks down entirely as a medium for carrying compensation. The use of it involves the necessity of a definite and fixed ratio between the burden or amount of the tax on the material when worked up into the finished or partly finished product. The conditions among materials and methods of manufacture make it impossible to establish any ratio which shall be fair and equitable in all cases and circumstances. . . . . The bill H.R. 11,019 provides, in paragraph 4, that all yarns made wholly or in part of wool shall be subject to the uniform rate of 30 per cent *ad valorem*. As the rate provided for raw wool, whether unwashed, washed, scoured, or in any other condition, is 20 per cent, the manufacturers of yarns will have a margin in the rate on their products over the rate paid on the highest as well as the lowest condition of unmanufactured wool.

Secretary Knox of the Department of State has given the first public information thus far furnished concerning the reorganization of the Department of State in a document issued for general distribution on May 21 in which he reviews the changes that have taken place since he first undertook the duty of putting the department upon its present basis. Reorganization has been effected by creating certain new places in the department and reassigning the duties under them. A director of the consular service has been appointed to take charge of all matters relating to consular reports, consular assignments of duty, and the like. To a resident diplomatic officer and counselor of the department respectively have been assigned various duties of a legal character and of a general diplomatic nature. Divisions with appropriate names have been organized and directed to take charge of the work naturally falling within their spheres. In a new "Division of Latin-American Affairs" have been centered all subjects relating primarily to trade with South and Central American countries; a "Division of Far Eastern Affairs" has been given similar duties pertaining to the Orient, and in a "Division of Near Eastern Affairs" have been placed those questions that relate to Turkey, the Balkan States,

Greece, and adjacent countries. Two "commercial advisers" have been appointed as adjuncts to the Bureau of Trade Relations and other similar additions have been made to the staff in other directions. One object of the various alterations has been to secure by diplomatic intervention the same kind of recognition for Americans who wish to invest capital in foreign countries that is secured by European governments for their citizens.

Strong efforts are being made by the federal authorities to check the unnecessary growth of the national banking system. Comptroller of the Currency Murray has already sought to do what he could in this direction, refusing charters to banks organized under speculative auspices or in places where there was probably not enough business for additional banking capital. Mr. Murray is now taking further steps in the same direction. In a "circular" issued to bank examiners and numbered 68 he has placed the cost of making a local examination preliminary to the granting of a new charter upon the applicants for the charter. At the same time, the comptroller has formulated new and much more elaborate instructions intended to guide the examiners in forming a judgment whether the organizers of the new bank are responsible in character and are at the same time men likely to be able to live up to the requirements of the national banking law, as well as able to meet the double liability of stockholders and other obligations of similar kind. It is probable that this new set of instructions, taken in conjunction with the restrictions already in existence, will considerably limit the addition of small banks to the national system.